

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:07-CR-00071-F-1
No. 7:12-CV-00138-F

JAMES EDWARD FRAZIER, JR.,)
Petitioner)
)
v.)
)
UNITED STATES OF AMERICA,)
Respondent)

O R D E R

This matter is before the court on Objections [DE-46] to the Memorandum and Recommendation [DE-43] of United States Magistrate Judge Kimberly A. Swank, regarding the Government's Motion to Dismiss [DE-35] James Edward Frazier, Jr.'s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE-28]. For the reasons set forth below, the court ADOPTS the recommendation of the Magistrate Judge to ALLOW the Government's Motion to Dismiss.

I. Background

On May 24, 2012, Frazier filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE-28]. In his section 2255 motion, Frazier argues that he is not a career offender in light of *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc). The Government filed a Motion to Dismiss [DE-35], arguing that dismissal is warranted because Frazier's motion is untimely.

On April 2, 2014, the Magistrate Judge issued a Memorandum and Recommendation ("M&R") [DE-43] addressing Frazier's section 2255 motion. The Magistrate Judge concluded that Frazier's section 2255 motion was untimely under each prong of 28 U.S.C. § 2255(f). [DE-

43] at 3-4. The Magistrate Judge further concluded that Frazier was not entitled to equitable tolling. *Id.* at 4-5. The Magistrate Judge found that dismissal was further warranted because Frazier's claim was barred by the waiver in his plea agreement. *Id.* at 5-6. The Magistrate Judge recommended that Frazier's section 2255 motion [DE-28] be denied and the Government's Motion to Dismiss [DE-35] be allowed. *Id.* at 6.

Frazier filed Objections [DE-46] to the M&R on April 28, 2014. In his Objections, Frazier argues that pursuant to *Simmons*, he can no longer be categorized as a career offender. Frazier further argues that pursuant to *Whiteside v. United States*, 748 F.3d 541 (4th Cir. 2014), the Government's Motion to Dismiss should be denied. Frazier specifically argues that his section 2255 motion is timely; he is entitled to equitable tolling; and his plea waiver does not bar his requested relief.

II. Discussion

Frazier is Not Entitled to Relief Under *Whiteside*.

In support of his Objections, Frazier relies on the then recently-issued panel decision in *Whiteside*. In the panel opinion, the Fourth Circuit Court of Appeals held that a prisoner may use a section 2255 motion "to challenge a sentence that was based on the career offender enhancement . . . when subsequent case law reveals the enhancement to be inapplicable to him." 748 F.3d at 543. This initial opinion in *Whiteside* was vacated upon the grant of rehearing en banc on July 10, 2014. *See Whiteside v. United States*, 2014 WL 3377981 (4th Cir. 2014).

On rehearing en banc, the Fourth Court concluded that a petitioner could not invoke equitable tolling in support of a *Simmons* claim. *See Whiteside v. United States*, 775 F.3d at 186 (4th Cir. 2014) ("Equitable tolling thus may not be applied where, as here, the only impediment

to timely filing was the discouragement felt by petitioner when calculating his odds of success.”).

Accordingly, Frazier cannot rely on *Whiteside* in support of his section 2255 motion.

III. Conclusion

For the foregoing reasons, the court ADOPTS the recommendation of the Magistrate Judge as its own, and for the reasons stated therein, in addition to the above-stated reasons, the Government’s Motion to Dismiss [DE-35] is ALLOWED and Frazier’s section 2255 motion [DE-28] is DISMISSED. The court concludes that Frazier has not made the requisite showing to support a certificate of appealability. Therefore, a certificate of appealability is DENIED.

SO ORDERED.

This the 17 day of March, 2015.

James C. Fox
James C. Fox
Senior United States District Judge